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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 159

PIEDMONT AVIATION, INC., *Petitioner,*

against

STATE AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER, PIEDMONT AVIATION, INC.

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TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	8
SUMMARY OF ARGUMENT	8
ARGUMENT	11
POINT I. Piedmont was an applicant for the routes awarded to it. The Board's finding to this effect was a finding of fact which the Court is without power to set aside	11
POINT II. The Board clearly has the power to include in a certificate the obligation to serve points which the applicant did not ask to serve in its written application. It was error for the court below to rule otherwise	24
POINT III. Piedmont was fit, willing and able to provide the service authorized. The Board's finding to this effect was erroneously reviewed by the court below, and was improperly set aside by that court	29
POINT IV. The court below was correct in holding that it had no power to order the Board to issue a certificate to State	34
CONCLUSION	37

TABLE OF CASES CITED.

Alton Railroad Co. v. *United States*, 315 U. S. 15, 86 L. Ed. 586, 62 S. Ct. 432	28
Boulevard Transit Lines v. *United States*, 77 F. Supp. 594	27

Page

Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. *United States*, 322 U. S. 1, 88 L. Ed. 1093, 64 S. Ct. 842 ..... 10, 25, 26, 27, 28
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437 ..... 10, 17, 35, 36
Inland Navigation Co. v. United States, 76 F. Supp. 567 27
Jarman v. *Collins-Hill Lumber and Coal Co.*, 226 Iowa 1247, 286 N. W. 526 16
Linn v. *Linn*, 242 Ala. 688, 8 So. (2d) 187 ..... 16, 17
Market Street Ry. Co. v. *Railroad Commission*, 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770 23
McCracken v. *United States*, 47 F. Supp. 444 27
McGoldrick Lumber Co. v. *Benewah County*, 54 Idaho 704, 35 P. (2d) 659 16
North Atlantic Routes Case, 6 C.A.B. 319 19
North Central Case, 7 C.A.B. 639 20
Panagra Terminal Investigation Case, 4 C.A.B. 670 .. 20
Randall v. *Osborne*, 162 App. Div. 186, 177 N.Y.S. 691 16
Rocky Mountain States Case, 6 C.A.B. 695 20
Securities and Exchange Commission v. *Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626, 63 S. Ct. 454 22
Towne v. *Eisner*, 245 U. S. 418, 62 L. Ed. 372, 38 S. Ct. 158 18
West Coast Case, 6 C.A.B. 961 20
Wiley v. *Corporation of Bluffton*, 111 Ind. 152, 12 N. E. 165 16
W. R. Grace & Co. v. *Civil Aeronautics Board*, 154 F. (2d) 271 22

TABLE OF STATUTES CITED.

Administrative Procedure Act of 1946
(60 Stat. 237 ff., 5 U.S.C. §§ 1001-1011)

Section 10(e), Judicial Review of Agency Action (60 Stat. 243, 5 U.S.C. § 1009(e)) 36

Civil Aeronautics Act of June 23, 1938
(52 Stat. 977 ff., 49 U.S.C. §§ 401-680) 2, 24, 29

Section 2, Declaration of Policy (52 Stat. 980, 49 U.S.C. § 402) 24, 29

Page

Section 401, Certificate of Public Convenience and Necessity (52 Stat. 987, 49 U.S.C. § 481) 9, 18

(a) Certificate required 2
(b) Application for certificate 3
(c) Notice of application 3
(d) Issuance of certificate 3, 26, 37
(f) Terms and conditions of certificate 10, 24, 25, 26

Section 1006, Judicial Review of Board's Orders (52 Stat. 1024, 49 U.S.C. § 646) .....

(e) Findings of fact by Board conclusive...11, 30
(f) Certification or certiorari 2

Motor Carrier Act of 1935 (49 Stat. 551 ff., 49 U.S.C. § 306 et seq.) 25, 26, 29

Section 207(a), Issuance of Certificate (49 Stat. 551, 49 U.S.C. § 307(a)) 26

Section 208(a), Terms and Conditions of Certificate (49 Stat. 552, 49 U.S.C. § 308(a)) 26, 27

28 U.S.C. § 1254 (See Pub. L. 733, 80th Congress, 2nd Session) 2

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BRIEF FOR THE PETITIONER, PIEDMONT AVIATION, INC.

Opinions Below.

The opinion of the Court of Appeals is reported in 174 F. (2d) 510. It also appears at pp. 675-686 of the printed Record before this Court. The supplemental opinion of the Civil Aeronautics Board is reported in 8 C.A.B. 716 (adv. sheets), and appears at pp. 610-628 of the printed Record before this Court. The original opinion of the Civil Aero-

nautics Board is reported in 7 C.A.B. 863, and appears at p. 565 of the printed Record.

Jurisdiction.

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals by virtue of the following statutory provisions: 28 U.S.C. § 1254 (see Pub. L. 773, 80th Cong., 2nd Sess. ch. 646), and § 1006 (f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U.S.C. § 646 (f)).

Petition for a writ of certiorari was filed on July 2, 1949, and was granted by this Court on October 10, 1949.

Statement of The Case.

Petitioner, **Piedmont Aviation, Inc.**, is an air carrier engaged in transporting persons, property and mail by aircraft in the United States. It operates pursuant to a certificate of public convenience and necessity which was issued to it by the Civil Aeronautics Board on December 12, 1947 under the Civil Aeronautics Act of 1938, as amended (52 Stat. 977 ff., 49 U. S. C. §§ 401-680). State Airlines, Inc., the Respondent here, was an unsuccessful applicant before the Civil Aeronautics Board for the certificate which was issued to the Petitioner.[1]

Section 401(a) of the Act provides that no air carrier shall engage in any air transportation without holding a

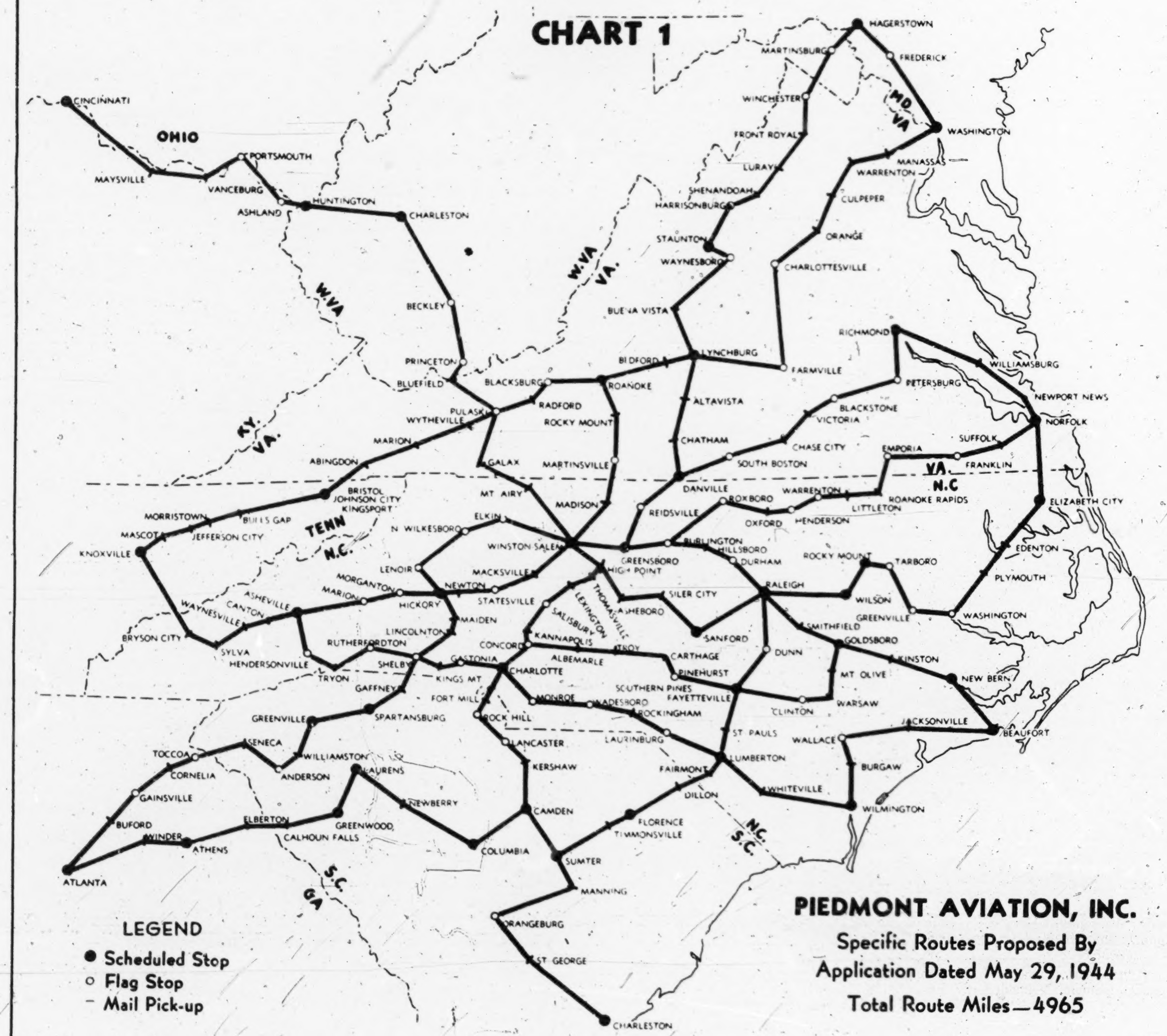
[1] In the court below, State was the petitioner seeking review of the Board's order issuing the certificate, the Board was the respondent, and Piedmont, Your Petitioner, was an intervenor. Each of the three parties filed a petition for a writ of certiorari, and all petitions were granted (Nos. 157, 158 and 159).

In this brief the Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called the "Board". The Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 977 ff., 49 U. S. C. § 401-680) will be called the "Act". Petitioner will be called "Piedmont", and State Airlines, Inc., will be called "State".

All italics are ours unless otherwise specified.

Numerical references in parentheses refer to pages of the printed Record filed with this Court.

CHART 1



LEGEND

- ● Scheduled Stop
- ○ Flag Stop
- – Mail Pick-up

PIEDMONT AVIATION, INC.

Specific Routes Proposed By
Application Dated May 29, 1944
Total Route Miles—4965

certificate issued by the Board and authorizing such transportation. Sections 401(b) and (c) provide for the filing of applications for certificates in such form and containing such information as the Board may require, for the giving of public notice of such applications, and for the holding of hearings thereon. Section 401(d) empowers the Board to issue a certificate authorizing "the whole or any part of the transportation covered by the application" if it finds: (1) "that the applicant is fit, willing and able to perform such transportation properly", and (2) "that such transportation is required by the public convenience and necessity."

Pursuant to section 401(b) of the Act, Piedmont filed an application with the Board on May 29, 1944. (28-61.) This application requested that Piedmont be awarded a certificate authorizing the transportation of passengers, property and mail on the numerous specific routes shown in color on Chart 1, which is inserted opposite this page. Study of Chart 1 will reveal that these routes form a comprehensive network in the broad area bounded by Washington, D. C., Norfolk, Wilmington, N. C., Charleston, S. C., Atlanta, Knoxville and Cincinnati. The routes have a total length of 4,965 miles. (43.)

In addition to requesting the specific routes shown on Chart 1, Piedmont's application also requested "such modification of such routes as the Board may find public convenience and necessity require" and "such other and further relief, general and specific, under section 401 [of the Act] as the Board may deem appropriate." (31, 41.)

By February 24, 1945, numerous other corporations had also filed applications for certificates authorizing air transportation in the southeastern part of the United States. On that date the Board entered an order which "consolidated into one proceeding" the application of Piedmont described above, certain applications which had been filed by State, and numerous applications by other parties. This proceeding was designated the Southeastern States Case. (27.)

Thereafter, about March 8, 1945, Piedmont filed an amendment to its application. (62-71). Under the amendment Piedmont specifically applied for a certificate authorizing the transportation of passengers, property and mail on certain routes and the transportation of property and mail on other routes. These routes are set forth on Chart 2 on the opposite page. Chart 2 shows that here again Piedmont specifically applied for a comprehensive network of air routes.[2] The routes total 5,763 miles in length, and cover a broad area bounded by Washington, Norfolk, Wilmington, N. C., Charleston, S. C., Atlanta, Knoxville, and Charleston, W. Va. (653, 652).

Piedmont's application as amended also contained a request for authority to carry "*passengers*" as well as mail and property "on the routes described herein," referring to *all* the routes described in the application. (41, 63.)

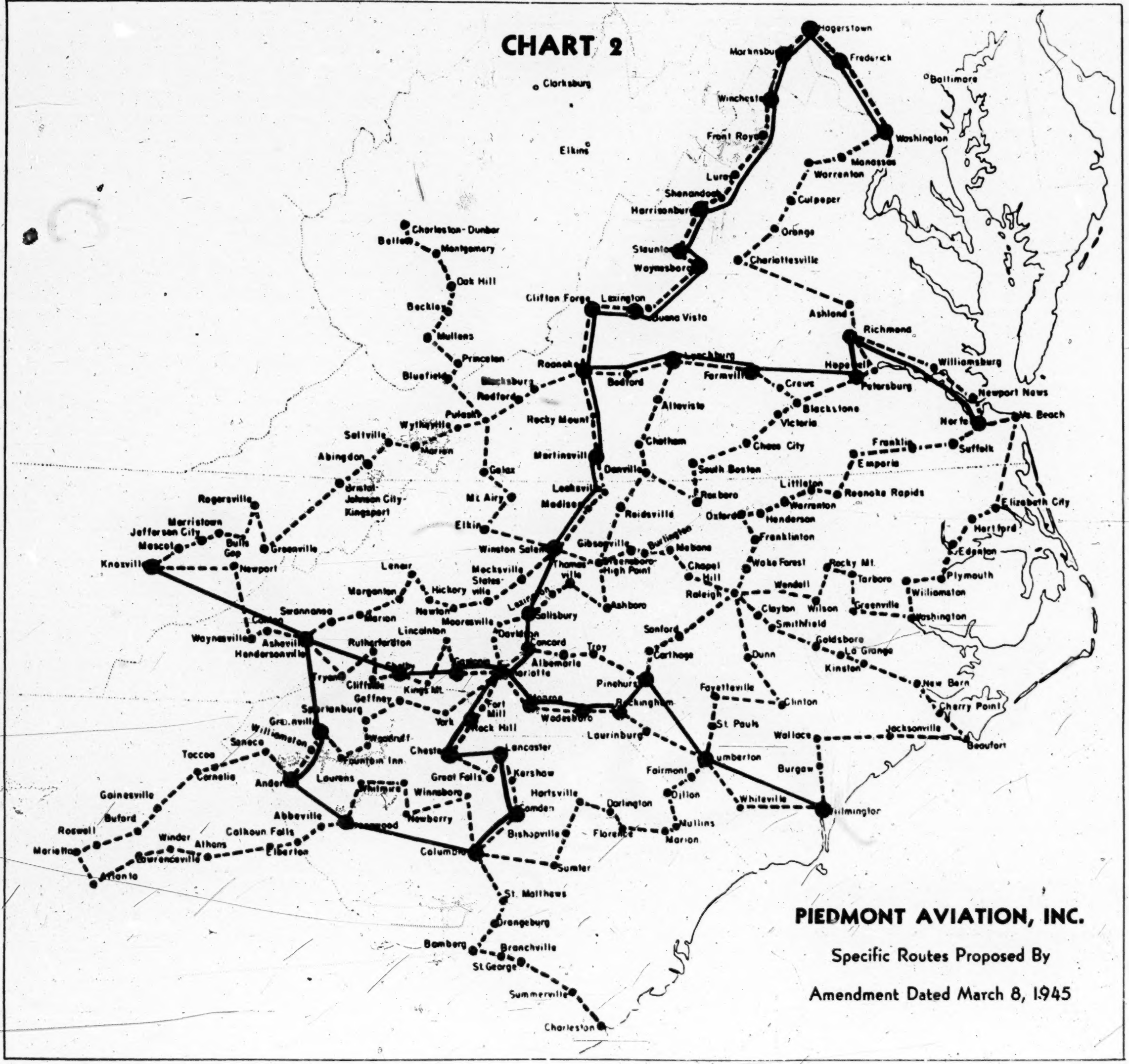
Furthermore, Piedmont's application as amended requested "such modification of such routes [referring again to all the routes specified in the application] as the Board may find public convenience and necessity require," and such "further relief, general and specific, under section 401 as the Board may deem appropriate." (63, 41.)

A hearing was held before Examiners of the Board in June 1945, and Piedmont, State and 23 other applicants presented evidence in support of their applications. After the hearing briefs were filed with the Examiners. Piedmont, in its brief to the Examiners, reiterated its desire to carry *passengers* on *all* the routes for which it had applied if the Board should find such service required. (489.) Also, Piedmont contended that the applications of State should be denied in their entirety. (498, 499, 501.)

---

[2] The Court of Appeals in its opinion below printed a map which purports to show the routes for which Piedmont specifically applied (676, top map). *However, that map is erroneous because it failed to print most of the routes for which Piedmont did specifically apply. The true picture is set forth in Charts 1 and 2 in this brief.* The court below of necessity conceded that its map did "not purport to show all of the points and routes applied for . . . by Piedmont" (679).

CHART 2



PIEDMONT AVIATION, INC.

Specific Routes Proposed By

Amendment Dated March 8, 1945

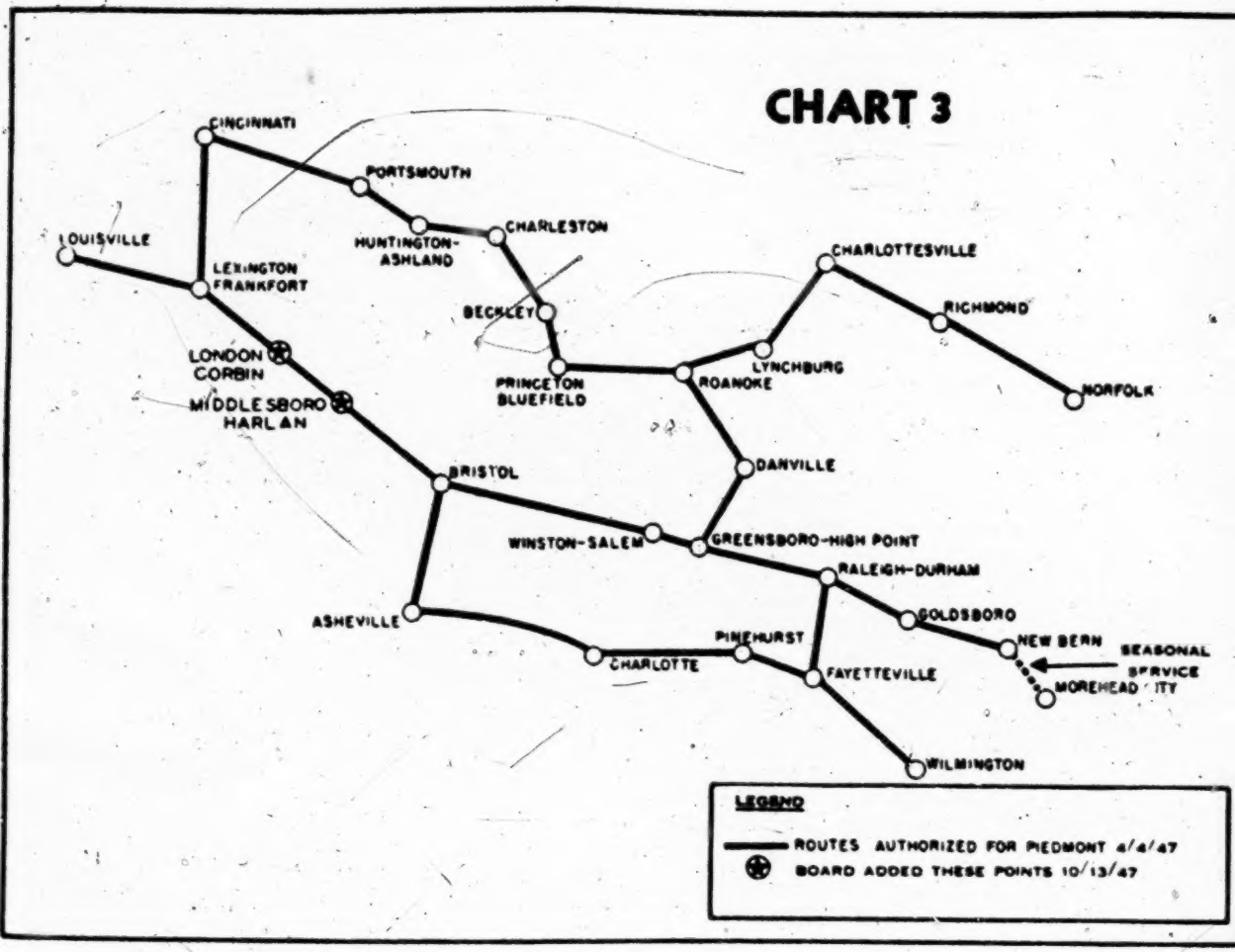


CHART 3
CINCINNATI
PORTSMOUTH
LOUISVILLE
HUNTINGTON-
ASHLAND
CHARLESTON
LEXINGTON
FRANKFORT
CHARLOTTESVILLE
BECKLEY
RICHMOND
LONDON
CORBIN
LYNCHBURG
PRINCETON
BLUEFIELD
ROANOKE
NORFOLK
MIDDLESBORO
HARLAN
DANVILLE
BRISTOL
WINSTON-SALEM
GREENSBORO-HIGH POINT
RALEIGH-DURHAM
GOLDSBORO
ASHEVILLE
PINEHURST
NEW BERN
SEASONAL
SERVICE
CHARLOTTE
FAYETTEVILLE
MOREHEAD CITY
WILMINGTON
LEGEND
ROUTES AUTHORIZED FOR PIEDMONT 4/4/47
BOARD ADDED THESE POINTS 10/13/47

Thereafter the Examiners of the Board issued their Report and recommended, among other things, that Piedmont be certificated to carry passengers, property and mail on part of the route system which was eventually certificated by the Board (520). Piedmont and the other applicants then filed exceptions and briefs to the Board, and participated in the oral argument before the Board. At this stage, as earlier, Piedmont urged that all its specifically described routes should be certificated, and also expressed its willingness to serve other points under the "catch all" clause in its application. (554.)

Piedmont had clearly recognized State as a competitor for the routes involved, and, on brief and argument before the Board, made extended reference to this competition and to State's lack of experience and proper qualifications. (539-548, 551-556.) If State did not realize previously (as it should have) that Piedmont and State were competitors for the same routes, then surely it did so when counsel for Piedmont preceded counsel for State at the argument and made numerous pointed comparisons which were very detrimental to State. (555.) State's argument neither contradicted these comparisons nor complained as to the notice given it.

After hearing the argument and considering the evidence, the Board issued its original opinion on April 4, 1947. (565; 7 C.A.B. 863-941.) In its opinion the Board found that the public convenience and necessity require the transportation of passengers, property and mail on the routes shown on Chart 3, which is inserted opposite this page. (565, at 892-896.) A study of this Chart will show clearly that the routes selected by the Board are covered by Piedmont's application. Whereas Piedmont had applied for specific routes extending for many thousands of miles (and for modification of those routes as the Board might see fit), the Board found service required on only 1,700 route miles. The routes selected by the Board cover a smaller area than that which Piedmont proposed to serve, and they conform to a substantial degree with the routes specifically proposed by Piedmont.

In its opinion of April 4, 1947, the Board made the following additional findings:

1. Piedmont was an applicant to perform the transportation which the Board had thus found to be required. (565, at 898, 901).

2. Three of the applicants (Gillespie, Blue Grass and Commonwealth) "met the test of fitness, willingness and ability," but the business interests of those companies were centered in Tennessee, Kentucky and Ohio, and the public interest would be better served by awarding a certificate to some one of the other applicants "whose activities are conducted in, and who have close ties with, the area [North Carolina and Virginia] embracing a major portion of the local system herein prescribed." (565, at 899.)

3. Piedmont was fit, willing and able to perform the transportation found required, and was better qualified than State (or any other applicant) to perform such transportation. (565, at 899-902.)

With respect to the selection of Piedmont rather than State, the Board made an extensive review of the qualifications of the two applicants, and concluded as follows:

> "Thus, while State's plans are built substantially around one man—its president, Mr. Gilbert—Piedmont's wartime experience and extensive charter operations have enabled it to obtain a well-rounded organization with key personnel who are thoroughly familiar with the operating conditions of the area involved." (565, at 901, 902)

After the issuance of this original opinion, State petitioned the Board for reconsideration insofar as the Board had awarded the route system in question to Piedmont rather than to State. (566.) As requested by this petition, the Board reopened the case and heard argument on the points raised by State. (573.) *On December 12, 1947, the*

Board issued a supplemental opinion and unanimously reaffirmed its award to Piedmont. (610-620.) This supplemental opinion expressly reaffirmed the findings made in the original opinion, including the finding that Piedmont was in fact an applicant for the routes awarded. (616.)

On the same day, December 12, 1947, the Board issued the certificate of public convenience and necessity to Piedmont. Under the terms of the certificate and of the Act Piedmont commenced airline operations within a short period of time, and is continuing to render service on the routes awarded it.

A petition for review was filed by State with the United States Court of Appeals for the District of Columbia Circuit, and Piedmont intervened. On April 6, 1949, that court rendered a decision which would reverse the order of the Board on the following grounds:

1. Piedmont was not an applicant to perform the transportation authorized by the certificate. (681.)

2. The Board was without the power to issue a certificate to any applicant which did not specifically describe in its application, with no more than "slight deviations", the exact route system which the Board might find to be required. (681-683.)

3. The Board lacked the power to issue the certificate to Piedmont.

4. Piedmont was not fit, willing, and able to render the transportation which was authorized. (683-685.)

5. The orders and findings of the Board were "arbitrary and capricious and lacked the support of substantial evidence." (686.)

The court below held that it had no authority to direct the Board to issue a certificate to State, but it did order the case remanded to the Board for further proceedings "not inconsistent" with the rulings stated above. (686, 687.)

Piedmont and the Board both filed with this Court petitions for writs of certiorari, asking this Court to reverse the court below insofar as it had overruled the decision of the Board (Nos. 159 and 157). State, too, filed a petition for a writ of certiorari, asking this Court to order the Board to issue a certificate to State (No. 158). This Court has issued writs of certiorari in all three cases. Accordingly, the present brief will be addressed to the points raised by all parties.

Specification of Errors.

1. The Court of Appeals erred when it set aside the Board's finding of fact that Piedmont was an applicant for the routes awarded.

2. The Court of Appeals erred when it held that the Board lacked power to include in a certificate points and routes not applied for by the recipient of the certificate.

3. The Court of Appeals erred when it held that the Board lacked power to issue the certificate in question to Piedmont.

4. The Court of Appeals erred when it set aside the Board's finding of fact that Piedmont was fit, willing and able to perform the transportation authorized.

5. The Court of Appeals erred when it ruled that the findings of the Board were "arbitrary and capricious and lacked the support of substantial evidence."

6. The Court of Appeals erred when it reversed the decision of the Board.

Summary of Argument.

The Board has been endowed by Congress with unusually broad powers to establish the route pattern, and to control the development, of an air transportation system which now blankets the nation and also encircles the globe. A narrow circumscription of these powers, in the manner of

the court below, contravenes the clear Congressional intent in delegating the powers, and furthermore, denies to the Board the reasonable freedom of action which any administrative agency must have.

It is the Board, not the court, which has the expert judgment necessary to give proper weight to all the facts of record and to make ultimate findings of fact. This well-established principle is particularly applicable in a case such as this, where the Board had before it a factual record covering thousands of pages and involving the air service needs of a large area of this country. In the exercise of its expert judgment the Board has considered the multitudinous facts in this record and has found that Piedmont was in fact an applicant for the routes awarded it. The Court below improperly usurped the function of the Board when it set aside this finding of fact.

The Act provides that an application for a certificate shall be in such form and shall contain such information as the Board shall require; and it further provides that the Board's findings of fact shall be conclusive, if supported by substantial evidence. Here the Board found that Piedmont's application met the requirements of the Board and that Piedmont was in fact an applicant for the routes certificated. Since there was ample and very substantial evidence to support this finding of fact, the court below acted improperly when it substituted its own finding for the finding of the Board. Piedmont applied for specific routes serving nearly all the cities finally certificated and also conforming to a substantial degree to the very routes which were ultimately awarded. Furthermore, Piedmont's application (like those of other applicants) contained a "catch all" clause and a request for relief under Section 401 of the Act, the clear effect of which was to make Piedmont an applicant for any routes in the area which the Board might find required. Hence the Board's finding of fact was entirely proper and must be sustained.

Even if it be assumed *arguendo* that Piedmont was not in fact an applicant for certain portions of the route system

awarded it, the Board nevertheless had full power to award the certificate in question to Piedmont. The decision of this Court in *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *United States*, 322 U. S. 1, clearly establishes the power of the Interstate Commerce Commission to award a certificate under similar circumstances, and should be controlling here. Section 401(f) of the Act empowers the Board to include in a certificate "such reasonable terms, conditions and limitations as the public interest may require." Construed in such a manner as to serve the public interest, this power surely means that the Board, when certificating an applicant for services applied for, may add "terms" and "conditions" requiring other service for which no application was made but which the Board has found required. The court below wholly ignored the controlling effect of the decision of this Court and of Section 401(f).

Furthermore, the court below erroneously set aside the Board's finding that Piedmont was fit, willing and able to operate the routes awarded it. The Board's finding of fact was supported by substantial evidence, indeed by overwhelming evidence, of Piedmont's fitness, willingness and ability to serve the very routes for which it was certificated. The finding was set aside by the court below on the untenable ground that none of Piedmont's evidence on this point could be considered by the Board as to Piedmont's fitness, willingness and ability to serve points for which Piedmont did not specifically apply. This was a matter to be decided by the expert judgment of the Board, not by the legalistic hypotheses of a reviewing court.

For all the foregoing reasons this Court should reverse the decision below, and should affirm the Board's award to Piedmont. If the Court should nevertheless fail to affirm the award to Piedmont, it should *not* direct the Board to issue a certificate to State (as here urged by State). Under the holding of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, the Board would have continuing discretion to reconsider the case as the public interest might require.

POINT I.

Piedmont was an applicant for the routes awarded to it. The Board's finding to this effect was a finding of fact which the Court is without power to set aside.

The Board, in its supplemental opinion, summarized the facts of the case and then specifically stated:

> "Piedmont's application, when viewed in the light of all pertinent factors, shows that that carrier was, within the meaning of section 401(d) [of the Act], an applicant for the routes awarded it." (616.)
>
> "We conclude that Piedmont's request was sufficiently broad in scope to embrace the route awarded it." (615.)

This finding can not be set aside by the Court. It was a finding of fact made in the expert judgment of the Board, and was amply supported by substantial evidence. Section 1006(e) of the Act provides that on appeal to the courts:

> "The findings of fact by Board, if supported by substantial evidence, shall be conclusive."

The court below paid only lip service to the sound doctrine that courts shall be bound by administrative findings of fact which are supported by substantial evidence. The court below conceded that the issue as to whether Piedmont was an applicant for the routes awarded, was "a fundamental question of fact." (681.) Nonetheless, that court undertook its own brief analysis of certain *selected* facts, and in effect substituted its own finding for the finding of the Board. The court below was clearly in error, therefore, when it set aside the Board's positive finding that Piedmont was an applicant for the routes awarded.

The Board's finding was amply supported by the evidence in the case. A comparison of Charts 1 and 3, inserted above, demonstrates clearly that Piedmont's original application specifically proposed service to all of the points included in the certificate except the few on the Y-shaped

extension resulting from the inclusion of service to Louisville. Chart 2, inserted above, shows that *Piedmont's application as amended also specifically proposed service to nearly all the cities certificated, and it specifically proposed service along a very substantial portion of the routes certificated.*

The map which the court below included in its opinion (676, top map) does not correctly reflect the routes for which Piedmont specifically applied. The court below admittedly set forth in that map only a *part* of the routes and services specifically sought by Piedmont. (679.) Although the court stated that its map showed all the routes specifically proposed by Piedmont for the carriage of *passengers* (679), such is not the case.

Piedmont's application, both in its original form and in its amended form, specifically applied for many more routes than are shown in the map of the court below. The true picture is set forth in Charts 1 and 2, which are inserted above. Furthermore, Piedmont's application, in its original form and as amended, contained a request to carry "*passengers, mail and property on the routes described herein,*" *referring to all the routes described in the application.* (41, 63.) Thus, Piedmont applied generally for the right to carry *passengers*, as well as property and mail, on all the routes shown in Charts 1 and 2. The court below, in drawing its map, used Chart 2 as a basis but eliminated from that Chart many routes which the court said were proposed only for the carriage of property and mail. In doing so, the court below erroneously ignored Piedmont's clear request to carry *passengers* on all the routes shown.

Piedmont's specific application, without more, furnished a substantial basis upon which the Board could properly find (as it did) that Piedmont was in fact an applicant for the routes awarded. The routes and services *specifically* proposed conform to a substantial degree to the routes awarded. The application as amended specifically sought *5,763* route miles in a broad area bounded by Washington, Norfolk, Charleston, S. C., Atlanta, Knoxville, and Charles-

ton, W. Va. (See Chart 2, above.) In contrast, the Board awarded Piedmont only *1,700* route miles in a smaller area.

In addition to these specific requests for a comprehensive route system in the area, Piedmont's application contained a broad "catch all" clause. This "catch all" clause was set forth in Piedmont's original application and was restated in its amendment as follows:

> "The applicant, Piedmont Aviation, Inc., * * * hereby applies for a permanent and/or temporary certificate of public convenience and necessity * * * for the authorization to engage in scheduled air transportation * * * on the routes detailed herein, *or such modification of such routes as the Board may find public convenience and necessity require.*" (63)

Under all of the circumstances of the proceeding before the Board, this "catch all" clause amplified Piedmont's specific requests so that the Board clearly had an adequate basis for finding Piedmont to be an applicant for the routes awarded. The court below committed fundamental error when it held that under such a clause the Board could certificate no more than "slight deviations" from the routes specifically applied for. (681.) Here again the court singled out one part to the exclusion of the meaning of the whole. In this instance the court below selected the word "modification" which is contained in Piedmont's "catch all" clause. In construing this one word, the court had brief resort to one dictionary definition, one court decision which is not in point, and one item of evidence which is not relevant. The court then said that "no reasonable mind could conclude that the routes awarded to Piedmont were merely a modification of the routes proposed by it." (680, 681.)

Had the court below made a proper study of the dictionary, of judicial decisions construing the word "modification," and of the record in this case, it would have seen that the word "modification" signifies *a change of a substantial nature, including a substantial increase in size.* The

word has no such narrow meaning as the court below attempted to ascribe to it. Most important, Piedmont's entire "catch all" clause, including the word "modification", had a well-recognized meaning in the present proceeding. This clause, like the similar clauses used by the other applicants, stated to the Board and to all concerned that the applicant wished to be considered a candidate for any route in the area which the Board might find required. The court below erroneously ignored all these controlling matters.

The court below had resort to one brief dictionary definition of the word "modification". (680.) The court conceded that "'modification' ordinarily connotes change or altering," but then ruled that "such change or altering must not be great" and can include only "*slight deviations*" (680, 681). In holding that the "change or altering must not be great" and that in fact the change must be insignificant, the court below was clearly in error. Dictionary definitions of "modification" recognize in that word a much broader significance than was recognized by the court below. Other courts, too, have held that the word means change, and change of a substantial nature. Most important, the word "modification" as used in Piedmont's "catch all clause" had a particular meaning which was well known to all who participated in the Board proceeding, a meaning which signified *any change which the Board might find appropriate.*

Contrary to the decision of the court below, the dictionaries themselves recognize that "modification" has a broad meaning which includes *change of a substantial nature.* For example, Webster's New International Dictionary (2d ed. unabridged, 1947) first defines "modification" in terms of the verb "modify", and then states that the latter word means, among things:

> "4. *To change somewhat* the form or qualities of; to alter somewhat;

That Dictionary defines "to change" as meaning:

> *"To alter by substituting something else for, or by giving up for something else;* to put or take another or others in place of; to make substitution of, for, or among . . ."
>
> *"To render something essentially different from what it was, even to loss of identity, or the substitution of one thing for another".*

Hence "change" imports a *complete departure from existing substance.* "To modify," as stated above, means to change "somewhat." The same Dictionary defines "somewhat" as meaning "in some degree or measure," "some" being further defined as an "unspecified but *appreciable or not inconsiderable quantity, amount, extent, degree, etc.; more than a little, far from negligible.*"

Therefore, on the basis of dictionary definitions alone, Piedmont's request for "modification" of specified routes was a request for "something essentially different" from those routes, "even to loss of identity," and this to an "appreciable, far from negligible, degree." Hence, the court below committed grievous error when its brief excursion into semantics led it to believe that "modification" means a change which "must not be great" and which must in fact be insignificant. To give the word this highly restricted meaning is to strip it of its real import. Consider two simple examples. Since time immemorial adverbs have been said to "modify" verbs. The word "not" is an adverb which "modifies" a verb so effectively that it completely reverses the meaning of any verb with which it is used. Adjectives are said to "modify" nouns. The adjective "infinite" may be used to "modify" the noun "interest," thereby giving that noun a connotation entirely different from what it would have if it were "modified" by "infinitesimal" instead.

Given its proper import as set forth in the dictionaries alone, the word "modification," used in the "catch-all" clause in Piedmont's application, served notice on all con-

cerned that Piedmont was requesting any substantial changes in the specified routes which the Board might find required. Thus, even in the stratified atmosphere of the dictionary, Piedmont's application was clearly sufficient to form the basis for the Board's finding that Piedmont was in fact an applicant for the routes awarded.

Many courts, unlike the court below, have held that "modification" and "modify" import change of a substantial nature, and encompass *a change which results in a substantial increase in size and extent.*

Courts, and administrative bodies too, frequently have statutory power to "modify" decrees and orders which are before them for review. In such situations the courts have held that the power to "modify" includes the power to make substantial changes and *to increase greatly* the relief previously awarded. For example, in *Jarman* v. *Collins-Hill Lumber & Coal Co.*, 226 Iowa 1247, 286 N. W. 526 (1939), the Supreme Court of Iowa considered the extent of a statutory power to "modify" an award made under a workmen's compensation statute. The Iowa court held that the power to "modify" included the power to increase an award from 10 weeks' compensation to 27 weeks' compensation.

The authority to "modify" tax assessments includes the power to increase the assessments substantially. *McGoldrick Lumber Co.* v. *Benewah County*, 54 Idaho 704, 35 P. (2d) 659 (1934). The power to "modify" a city charter includes the power to extend the city limits into outlying areas. *Wiley* v. *Corporation of Bluffton*, 12 N. E. 165 (S. C. Ind. 1887). And the power of a court to "modify" a judgment includes the power to set aside a judgment for one party with a direction to enter judgment for the other party. *Randall* v. *Osborne*, 162 App. Div. 186, 177 N. Y. S. 691.

The court below ignored such broad judicial constructions of "modify" as we have just cited. To support its own highly restricted view of the word, it cited only one judicial decision, *Linn* v. *Linn*, 242 Ala. 688, 8 So. (2d) 187

(1942). (680.) That case, when analyzed, lends no support whatever to the decision below. *Linn* v. *Linn* involved an application in a lower court to set aside a decree of divorce. The lower court was empowered by an equity rule to "*grant* or overrule said application *or modify* said decree." The very same rule provided that "no appeal will lie from such order unless it *modifies* the decree." After the lower court had entered an order *granting* the application to set aside the decree, an appeal was attempted. The Supreme Court of Alabama very logically held that the appeal would not lie, saying: "When Rule 62 includes a modification *along with* granting or overruling, it must have been intended to convey a different idea from them." (8 So. (2d) at 188.)

Thus, contrary to the ruling of the court below, *Linn* v. *Linn* is no precedent whatever for restricting the scope of Piedmont's application. In actual fact, the decision in *Linn* v. *Linn* strongly supports the present position of Piedmont and the Board. It emphasizes the basic principle that the word "modify" (or any word, for that matter) must be construed *in the context in which it is used. The court below ignored the whole context in which Piedmont used its "catch all" clause and the word "modification."*

Since the power to "modify" gives to *courts* broad power to make changes as the *courts* see fit, then surely Piedmont's request for "modification" gave the *Board* broad power to make changes in the specified routes as the *Board* saw fit. The Board, unlike the courts, is an administrative agency charged primarily with the duty of serving the public interest. In this capacity, the Board is not bound by the technical niceties of pleading and procedure which may apply to private litigants in the courts. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Differences between administrative bodies and civil courts, both in origin and function, are basic. Mr. Justice Frankfurter adequately summarized the differences in the *Pottsville* case, *supra*, when he said:

> "Perhaps the most striking characteristic of this movement has been the investiture of administrative

agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, *when their authority is invoked to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.*" (309 U. S. at 142, 143)

A proper application of this principle can lead only to the conclusion that the Board had a sound and reasonable basis for finding Piedmont to be an applicant for the routes awarded.

Most important of all, Piedmont's application, as amplified by its "catch all" clause, must be construed in the light of the circumstances in which it was used. Justice Holmes aptly stated in *Towne* v. *Eisner*, 245 U. S. 418, that, "A word is not a crystal, transparent and unchanged; *it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*" The court below wholly failed to apply this principle. Indeed, it selected, from the thousands of pages in this record, one sentence in Piedmont's testimony, and then twisted that sentence out of its logical meaning. (681.)

Piedmont specifically applied for the many routes and services which have been described. Its "catch all" clause sought "*such modification of such routes as the Board may find public convenience and necessity require,*" and also sought plenary relief under section 401 of the Act. Nowhere in this case did Piedmont in any way abandon or limit the all-inclusiveness of this request. Practically every

other application in the proceeding contained, in varying phraseology, a clause of similar import and intendment. Many examples of what had come to be known before the Board as the "catch all" clause may be found in this proceeding. (665-670.) Whatever the variations in individual expression, these clauses had come to have a well-defined meaning when used in proceedings before the Board; and this meaning renders resort to dictionaries and judicial decisions unnecessary.

The purpose of these clauses was to inform the Board, and any rival applicants, that the applicants making use of the clauses were applicants for any routes which might be awarded in a pending proceeding, whether or not such routes should correspond to the routes proposed by the applicants or any of them. In the present case, prior to the hearing, the Board's Examiners explicitly advised all parties to the case that use of the usual "catch all" clauses was proper "for the purpose of enabling the Board to grant a certificate to a point or points not specifically named in the application." (671.) That State fully recognized this meaning in the "catch all" clauses, is shown by State's reliance upon its own "catch all" clause in the original argument before the Board. (551.)

Before the present case came to hearing the Board itself had considered such "catch all" clauses and had given clear notice to all concerned that it would construe these clauses liberally in the light of the facts of each case. In the *North Atlantic Routes Case*, 6 C.A.B. 319, the Board had decided that three routes should be established across the continent of Europe. Giving a broad interpretation to the "catch all" clauses in various applications, the Board had transposed routes freely in the public interest. American Export, which had specifically applied only for a route across *central* Europe, was awarded a route across *northern* Europe. Pan American, which had specifically applied only for routes across *northern* Europe and across *southern* Europe, was awarded a route across *central* Europe. TWA, which had specifically applied for a route across *central*

Europe, was awarded a route across *southern* Europe. The Board went to great lengths in a unanimous opinion on this point to show that the "catch all" clauses of these various carriers in fact contemplated the awards which were made. (6 C.A.B. at 345-350.)

The Board has frequently considered such "catch all" clauses, and has given many practical examples as to whether a particular enlargement or change in a specific route pattern would be found as a fact to be within the scope of the clause. Thus in the *Rocky Mountain States Case*, 6 C.A.B. 695, the Board held that the inclusion, in the certificate issued to Summit Airways, of service to Salt Lake City, Utah, as a terminal point, was appropriate although this point did not appear on any of Summit's proposed routes and its inclusion involved an extension from Evanston, Wyoming, the most westerly point specifically proposed by Summit.

So also, in the *North Central Case*, 7 C.A.B. 639, Iowa Airplane Co. applied specifically only for routes emanating out of Des Moines, Iowa to other points which were *within the state of Iowa*. Nevertheless the Board found that service was required on routes extending from Des Moines as far north as Minneapolis/St. Paul, Minnesota, as far northwest as Huron, South Dakota, and as far west as North Platte, Nebraska. Under all of the circumstances of that case the Board found that Iowa Airplane Co., by virtue of its "catch all" clause, was an applicant for these routes, and the Board certificated the company to serve these routes even though most of the route mileage lay outside the state of Iowa.

On the other hand, the Board held in the *Panagra Terminal Investigation Case*, 4 C.A.B. 670, that an extension of Panagra's routes over some 1,200 miles from the Canal Zone to some terminal point in the United States was too great a change to be deemed a modification of its existing route structure. Similarly, in the *West Coast Case*, 6 C.A.B. 961, it held that the application of Los Angeles Airways, specifically proposing service out of Los Angeles to

points no farther north than Bakersfield and Santa Maria, was not broad enough to justify its selection under its "catch all" clause for routes extending hundreds of miles north to Medford, Oregon.

The foregoing examples clearly show that Piedmont's "catch all" clause, regardless of its precise wording, had a well-defined meaning in the proceeding before the Board. It served notice on all concerned that Piedmont wished to be considered as a candidate for any routes and services which the Board might find required. This being so, the application with its "catch all" clause formed a sound and reasonable basis for the Board's finding that Piedmont was in fact an applicant for the routes awarded.

The Board's order consolidating the many applications in this proceeding put all parties on notice that the Board intended to make a full study of air transportation in a vast area of the United States. In order to evolve an orderly and sound air transport system in the region, it was necessary that a route pattern be established consonant with the public convenience and necessity, that the qualifications of all applicants be considered together, and that the best qualified applicants be selected for the operation of the routes.

In an area case which involves the establishment of new local service, such as that provided by Piedmont, there are particularly compelling reasons why the Board should have reasonable freedom of action. Local-feeder services are still very much in the experimental stage and must be supported by substantial mail-pay subsidy. When establishing such services, the Board is vitally interested in securing the best possible experimental conditions. Of necessity it must first determine the best possible route pattern and then select the applicant which offers most in the public interest.

Whether a particular application with its "catch all" clause is an application for a route found required by the Board, is a question which must be determined by the Board on the basis of all the *facts* of record. That the question is

one of fact and not of law is clearly indicated by the Board decisions cited above and by the case of *W. R. Grace & Co. v. Civil Aeronautics Board*, 154 F. (2d) 271. In the latter case the Circuit Court of Appeals for the Second Circuit held that there was no requirement *of law* that a written application contain a substantially accurate point-by-point description of the routes to be certificated. There the court further held that the written consent of a carrier to serve a route determined to be necessary is the legal equivalent of a full dress application for such route. On rehearing, the court said:

> "But we adhere to the view that a *consent* by a carrier to a 401 (h) extension proceeding begun by the Board is the *legal equivalent of a petition for the same* extension initiated by the carrier." (154 F. (2d) at 287)

The solution of this question of fact in each case must be based upon factors such as the nature of the entire proceeding, the length of the mileage of the extended service, the amount of additional capital required to operate it, and the operating problems to be encountered. No fixed value can be assigned to any of these factors, and their individual weight and aggregate effect necessarily involve the exercise of expert judgment based on specialized knowledge and experience in a field which Congress has entrusted to the Board. In the exercise of its judgment, the Board expressly found as follows:

> "Piedmont's application, when viewed in the light of all pertinent factors, shows that this carrier was, within the meaning of Section 401(d), an applicant for the routes awarded it." (616)

This finding cannot be set aside by the Court. The case falls squarely within the rule announced by this Court in the case of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Con-

> gress has entrusted to the Agency—of course it must not be set aside because the reviewing Court might have made a different determination were it empowered to do so." (318 U. S. at 94)

State contended below that the Board's action, in regarding Piedmont as an applicant for the routes in question, denied State fair notice and hearing before the Board. The court below did not subscribe to this contention, and properly so. State had actual, specific notice that Piedmont was an active competitor for a substantial part of the route system involved. It had further notice, from Piedmont's "catch all" clause and from the nature of the proceeding, that Piedmont was a competitor for such other services as the Board might find required. State had a full opportunity at the hearing to present any evidence regarding itself and Piedmont which it might deem appropriate. This was "fair play." If State failed to see the play, that was only because it failed to look.

The decision of this Court in *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, makes it clear that State has no real grievance with respect to the notice and hearing afforded it before the Board. In that case the street railway company had notice only in the most general terms that an investigation was being commenced into certain matters, including "the reasonableness of rates and charges". After a hearing the commission reduced the company's rates and the company appealed on the ground that it had not been afforded proper notice. This contention was rejected by this Court, as follows:

> "We find that the company had reasonable notice that its rates were under attack and was not denied opportunity to be heard thereon. *We can well understand how counsel's attention became diverted to more sharply contested aspects of the case.* But even if a more convincing showing were made that the company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to

obtain such evidence was denied. *A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights.*" (324 U. S. 558, 559)

Upon the foregoing we submit that Piedmont was, beyond any question of doubt, an applicant before the Board for the routes certificated to it. The Board's finding to this effect was premised on substantial grounds, and should be sustained by this Court.

POINT II.

The Board clearly has the power to include in a certificate the obligation to serve points which the applicant did not ask to serve in its written application. It was error for the court below to rule otherwise.

Assuming, without conceding, that Piedmont's application did not request operations to the few points west of the Appalachians which were not included in its specific route proposals, nevertheless the Board was not thereby precluded from requiring service to these points. The decision below would prevent the Board from requiring such service and would thereby frustrate the fundamental purposes of the Act.

The Act provides that upon the appropriate findings, the Board may issue a certificate authorizing "the whole or any part of the transportation covered by the application". Nowhere in the Act is there found any provision which prohibits the Board from adding to the certificate the obligation to serve points not covered by the application. On the contrary, Section 401 (f) provides that "there shall be attached to the exercise of the privileges granted by the certificate . . . such reasonable terms, conditions and limitations *as the public interest may require.*" The term "public interest" is defined elsewhere in the Act as being

synonymous with "public convenience and necessity". (Section 2 of the Act).

This Court has held, under similar provisions of the Motor Carrier Act, that the Interstate Commerce Commission has clear power to include in a certificate authority for service substantially greater than the carrier had asked, and to many points the carrier had not requested. Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. U. S., 322 U. S. 1. The lower federal courts, with the exception of the court below, have consistently followed this Court's decision. In the present case, the court below completely ignored section 401 (f) of the Act; it ignored the decision of this Court in *Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. U. S., supra;* and it ignored the decisions of other federal courts. Indeed, the court below said that this was "a question not hitherto posed before any other court!" (682). It then ruled that the Board had no power whatever to add to a certificate points for which no application had been filed. (683). This was gross error.

The result of the decision below would be that after an investigation over a period of years had demonstrated a public need for air transportation from Cincinnati, Ohio to Charlottesville, Virginia, along with many other points, and after one or more applicants had been found fit, willing and able to perform satisfactory service in the area, all applications would have to be rejected and the investigation begun all over again because the applicants who proposed to serve Cincinnati did not propose to serve Charlottesville and those who proposed to serve Charlottesville did not propose to serve Cincinnati.

It was to prevent such a ridiculous result that Congress made express provision in the Act that the Board should not be bound to issue a certificate upon terms in form and substance as proposed by an applicant, but might add thereto such terms and condition as the public interest might require. Section 401(f) of the Act provides that:

> ". . . there shall be attached to the exercise of the privileges granted by the certificate. . . . such reason-

able terms, conditions and limitations as the public interest may require".

What could be more reasonable in the public interest than to condition the privilege of operations to points requested upon the assumption of the obligation to extend the service to other points which the Board finds to need the service, and which the Board finds the applicant fit and able to serve?

Any doubt which might otherwise exist that the Board has this power was laid to rest by the decision of this Court in the case of *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *United States, supra.*

That case arose under Part II of the Interstate Commerce Act, known as the Motor Carrier Act, particularly under Sections 207(a) and 208(a) thereof. Section 207(a), like Section 401(d) of the Civil Aeronautics Act, empowered the Commission to issue a certificate, "authorizing the whole or any part of the operations covered by the application." Section 208(a), like Section 401(f) of the Civil Aeronautics Act, provides that there shall "be attached to the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require . . ."

In that case the motor carrier applicant had specifically withdrawn from its application its request for numerous points. It had no "catch all" clause in its application, and at the hearing it expressly stated that it was unwilling to serve the many points in question. Yet the Commission found a need for the service and issued a certificate authorizing service to the points in question. The applicant accepted the certificate and competitors appealed.

On review this Court said:

> "The question of law in the case is whether the Commission on its finding need for such service had power to authorize service of intermediate points *not asked for by the applicant.* The applicant has accepted and is defending the grant, but the competing rail carriers complain of it." (322 U. S. at 3)

This Court then held that under the authority conferred by Section 208(a)

> "It is clear that the Commission on the facts found had power to include in the authorization *provision for service greater than the carrier had asked.*" (322 U. S. at 4)

Under the principle announced by this decision the Board had clear power to include in Piedmont's certificate "provision for service greater than the carrier had asked." In the above-quoted decision this Court upheld the Commission's award even though the motor carrier applicant had withdrawn i s application to serve the many poi' s in question, even though it had no "catch all" clause, and even though it stated its unwillingness to serve the additional points. The Board's award to Piedmont did not go nearly so far. Piedmont, unlike the motor carrier applicant, had a "catch all" clause in its application. Piedmont, unlike the motor carrier applicant, expressly stated at the hearing its willingness to serve other points not specifically named in its application. (470). Obviously the Board had legal power under such circumstances to award Piedmont its certificate.

Other federal courts, with the exception of the court below, have consistently followed and applied the sound principle announced by this Court in *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *U. S., supra.* See *Boulevard Transit Lines* v. *U. S.*, 77 F. Supp. 594 (1948); *Inland Navigation Co.* v. *U. S.*, 76 F. Supp. 567 (1948); *McCracken* v. *U. S.*, 47 F. Supp. 444.

In the *McCracken* case, *supra,* the Interstate Commerce Commission had again issued to a motor carrier a certificate authorizing it to render service at certain points even though it was unwilling to render such service. A three-judge court affirmed the decision of the Commission and said in its opinion

> "Congress, in order to render the elimination of excrescences more easy and the building of the transpor-

tation structure more symmetrical, *by section 208 gave the Commission power to prescribe 'terms, conditions, and limitations as the public convenience and necessity may require.'* * * *

"* * * they could place such terms in the certificate as were required by public necessity to make the operations conducted thereunder consistent with operations carried on by others and convenient for the public. * * **the Commission could add such terms or conditions, even if he were unwilling.*

"The plaintiffs misconceive their rights in the matter. The only ground of attack could be that the public necessity and convenience were not served. The Commission found to the contrary."

This Court has also upheld the broad powers of the Interstate Commerce Commission in the related case of *Alton Railroad Co.* v. *United States*, 315 U. S. 15. There the Commission had awarded a "grandfather" certificate to a motor carrier engaged in automobile "drive-away" service in fourteen states. Although the applicant had operated only an infrequent service to many of the states *and had in fact served only one or two cities in such states*, the Commission certified the carrier to serve *every city in most of the states for which application had been made.* On review this Court held the award to be within the broad powers and discretion of the Commission, saying this "judgment is for the administrative experts, not the courts." (315 U. S. at 22).

With respect to the Board's power to certificate service to points for which no application has been made, the provisions of the Civil Aeronautics Act are similar in wording to those provisions of the Motor Carrier Act upon which this Court relied in *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *U. S.*, *supra*. In the Civil Aeronautics Act and in the Motor Carrier Act, the basic criterion is "public interest" or its counterpart, "public convenience and necessity". An interpretation of this term "public interest", as employed in these two statutes, establishes that

the Board has powers at least as great as the Interstate Commerce Commission to award routes and points for which no application has been made.

Section 2 of the Civil Aeronautics Act defines the "public interest" in the broadest possible terms and envisions an expansion of air service wherever feasible. The Motor Carrier Act, on the other hand, was enacted at a time when the motor carrier industry was seriously overexpanded, and was designed to bring stability through contraction and retrenchment if necessary. The basic public interest of the Civil Aeronautics Act is much more dynamic than that of the Motor Carrier Act. If the Motor Carrier Act authorizes the Interstate Commerce Commission to certificate service which the applicant has expressly stated its unwillingness to provide, and this Court has so held, then certainly the broader objectives of the Civil Aeronautics Act empower the Board to issue certificates for route segments and points as to which no application was made.

Therefore, assuming *arguendo* that Piedmont was not an applicant for the points for which it did not specifically apply, the Board nevertheless had full power under the Act to award Piedmont the certificate in question.

POINT III.

Piedmont was fit, willing and able to provide the service authorized. The Board's finding to this effect was erroneously reviewed by the court below, and was improperly set aside by that court.

The Board, in its original opinion and again in its supplemental opinion, found Piedmont to be fit, willing and able to provide the service authorized. (565, at 907, 614). This finding was premised on *substantial* evidence, indeed on overwhelming evidence, of Piedmont's outstanding qualifications. The Board itself attested to these qualifications:

> "Piedmont demonstrated superior operational experience acquired in the successful conduct of diversified

> aviation activities, and possessed physical facilities and a well-rounded organization with key personnel familiar with operating conditions in the area involved." (611).

Piedmont proved at the hearing that it was fit, willing and able to operate at least 5,763 route miles, the mileage specifically sought under its amended application. It demonstrated a proper organizational basis, a proper plan for the conduct of service in the manner authorized by the Board, and adequate financing. (283-290; 359-413, 414, 415, 439, 440, 446, 447). Furthermore, Piedmont proved conclusively that it had the experience and "know-how" to operate service over mountainous terrain. (289, 292, 445, 466).

All this proof most assuredly gave the Board "substantial evidence" from which to find Piedmont fit, willing and able to operate the service authorized. Piedmont's proof related to *at least 5,763 route miles.* The Board awarded Piedmont *only 1,700 route miles.*

In fact, Piedmont's fitness, willingness and ability were so apparent that even State's counsel conceded to the Board that they had been established. When asked by the Chairman of the Board the specific question whether State was taking the position that Piedmont was not capable of operating the routes to be certificated, counsel stated:

> "We are taking the position that both State and Piedmont are fit and able; it's a question of which has demonstrated in this record to be more fit, willing and able." (607)

Having taken this position, State had no standing in court to challenge the Board's finding, because section 1006 (e) of the Act provides:

> "No objection to an order of the Board shall be considered by the court unless such objections shall have been urged before the Board * * *".

Despite this clear provision of the Act, the court below considered State's argument that Piedmont was not fit, willing and able. This in itself was error. The court then reviewed the Board's finding of Piedmont's fitness, willingness and ability, and ruled that this finding was arbitrary, capricious and without any evidence to support it. (684). This is perhaps the most glaring error committed by the court. For the court to set itself up as having ability superior to that of the Board as to what attributes, characteristics and special skills shall constitute evidence of an applicant's fitness and ability to operate an air transportation system over a given route, is to negative the whole purpose of Congress to entrust this field to the specialized experience and expert knowledge of the Board.

In the first place, it is to be observed that the court based its conclusion upon a most limited and restricted view of the evidence and a positive non-legal standard adopted by itself as to what evidence the Board may consider on the point. There has never been any question but that there was adequate evidence to establish Piedmont's fitness, willingness and ability to conduct operations serving all of the certificated points in Virginia and North Carolina, where the major portions of the routes are located.

The real basis of the holding below is not that there was a total absence from the record of Piedmont's fitness, willingness and ability, but that, because Piedmont had not specifically asked in its application to serve Louisville and the other points west of the Appalachians, the Board could not properly consider any evidence offered by Piedmont of its fitness, willingness and ability in a case where service to those points was to be included in the certification. This is made clear by the fact that the court below, in its opinion, did not find absence of evidence of fitness and ability of Piedmont generally, but only with respect to the points "west of the Appalachians and over mountainous terrain." (684).

This finding by the court is all the more remarkable because there is not a scintilla of evidence in the record that operations extending to Cincinnati and Louisville required any other, different or additional qualifications by the operator than were required for operations to Roanoke, Virginia; Princeton, Bluefield, Beckley and Charleston, West Virginia; Asheville, North Carolina; and Bristol and Knoxville, Tennessee; service to all of which was specifically proposed by Piedmont. A glance at any appropriate topographical map demonstrates that service to all of these latter points involves operations over "mountainous terrain," such as that which the court, without any foundation in the evidence, seemed to regard as a formidable hurdle for air transportation to surmount. Where has the court acquired the expert knowledge to enable it to judge whether or not the technical ability to cope with elevations of four to five thousand feet is insufficient to cope with elevations a thousand or so feet higher? The court was obviously transcending its proper sphere of authority when it assumed to characterize as absurd the position taken by the Board's counsel that the same fitness and ability which would qualify an applicant to operate from Hagerstown to Norfolk would also qualify it to operate from Jacksonville to Miami. (685)

Instead of pointing out wherein it considered Piedmont's evidence of fitness, willingness and ability sufficient to show its ability to operate the routes certificated, the court below concentrated on a single statement of Piedmont's counsel. (684). This statement pointed out that one of Piedmont's routes followed the Shenandoah Valley and crossed the Blue Ridge Mountains only at a point where they were very low. The court below would have us believe that this was a fair characterization of all of the operations concerning which Piedmont offered any evidence of its fitness and ability. Reference to the record where this statement is set forth (553) makes it clear that this remark of counsel was directed only to a single route proposed by Piedmont, that from Columbia, South Carolina to Washington,

and was not intended to be offered as a description of Piedmont's entire proposed route system. The remark was introduced by the statement at the top of the cited page:

> "I would like to discuss first the proposed route from Columbia, South Carolina to Winston-Salem, and from Winston-Salem to Washington." (553)

The court below overlooked and failed to notice the following pertinent items of evidence put into the record by Piedmont which were most certainly considered by the Board to be relevant to Piedmont's fitness and ability to conduct operations to points west of the Appalachians and over mountainous terrain:

1. As shown by flight logs of only four of its pilots, Piedmont had conducted at least 28 actual flights from Winston-Salem, N. C., to points west of the Appalachians, to wit, Cincinnati, Ohio; Huntington-Ashland, Charleston and Beckley, West Virginia; and Middlesboro-Harlan, Kentucky. (292).

2. In addition to the flights just mentioned, the same pilots had flown at least 93 actual flights from Winston Salem to points such as Bristol, Asheville, Knoxville and Roanoke, all of which involved operations over mountainous terrain. (292).

3. Furthermore, Piedmont had conducted very extensive charter flights from its base at Winston Salem (289, 466); and Cincinnati and Chicago were among the most frequent destinations (445).

Piedmont introduced compelling proof that it was fit, willing and able to render service on at least 5,763 route miles, a substantial part of that mileage being over mountainous terrain. The Board, in its expert judgment, twice found Piedmont fit, willing and able to operate the mere 1,700 route miles awarded to it, and recognized Piedmont's outstanding qualifications. State conceded to the Board that Piedmont was fit, willing and able to operate the routes

awarded. Yet the court below set aside the Board's finding on the ground that "there was no evidence of Piedmont's appropriate qualification for the awarded routes." This ruling clearly overstepped the bounds of permissible judicial review. It was nothing more than a continuation of the court's original erroneous conclusion that Piedmont was not an applicant for the routes awarded. The Board's finding was entirely proper and must be sustained by this Court.

POINT IV.

The court below was correct in holding that it had no power to order the Board to issue a certificate to State.

The court below held that it lacked power to order the Board to issue a certificate to State. (686). State's cross-petition for a writ of certiorari (No. 159), which was granted by this Court together with the petitions of Piedmont and the Board, raised only this one point, contending that the court below should have directed the Board to issue a certificate to State. This contention has no merit.

Upon the basis of the points discussed previously in this brief, Piedmont submits that this Court will surely reverse the court below on the principal points in the case, and will affirm the Board's award to Piedmont. In this event there will be no reason for this Court to consider the single point raised by State's petition for certiorari. Once the Board's award to Piedmont is confirmed, as it should be, State can not possibly take the position before this Court that it *too* should be certificated by the Board.

However, in the event this Court should fail to affirm the Board's award to Piedmont, the Court should *not* direct the Board to issue a certificate to State and to rescind Piedmont's certificate (as urged by State). Any action toward a rescission of Piedmont's certificate, and the issuance of a certificate to State, would involve serious questions of public interest. It would involve a cessation of service by Piedmont over its entire system. It would raise vital questions with respect to mail payments, and a host of

other serious problems. *Such questions affecting the public interest would be peculiarly within the province of the Board to consider and decide.*

The evidence in this case was submitted in June 1945, four and one-half years ago. Since then circumstances have changed greatly in the airline industry. If the case should be remanded to the Board, therefore, the Board should be left free to consider these changed circumstances and to work out the best possible solution in the public interest. A direction to the Board to issue a certificate to State would preclude this sound result.

The court below was unquestionably correct when it considered itself bound by the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. In that case this Court carefully distinguished the respective functions of the courts and administrative agencies, saying:

> "The Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.' The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. *At this point the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest, or necessity.'*" (309 U. S. at 145)

Accordingly, this Court reversed an order of mandamus which would have required the Commission to consider the application solely on the basis of the record "as originally made and in accordance with the opinions" of the Court of Appeals.

That decision is controlling here. If the Board committed any error, it is the function of the court only to lay bare the error and to remand the case to the Board for further proceedings as the basic policy of the Act may

require. This Court has made it crystal clear that on a remand to the Board State would have no vested right to a certificate.

State apparently realizes that the relief it requests would be contrary to the decision of this Court in the *Pottsville* case. It urges, therefore, that that decision has been superseded by section 10(e) of the Administrative Procedure Act, which section provides that a reviewing court shall have power to "compel agency action unlawfully withheld." However, this provision of section 10(e) was merely intended to codify the existing law with respect to judicial review. It does not in any way supersede the decision of this Court in the *Pottsville* case.

That the above-quoted part of section 10(e) was merely intended to codify existing law is shown by its legislative history. The Senate Judiciary Committee Print of June 1945 had this to say:

> "A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. 'The objections to judicial review have been generally not to its availability but to its scope' (Final Report, Attorney General's Committee, p. 80). It is not possible to specify all instances in which judicial review may operate. *Subsection (e), therefore, seeks merely to restate the several categories of law subject to judicial review*".
>
> *Administrative Procedure Act, Legislative History*, 79th Congr., 2d Sess., Sen. Doc. No. 248, at p. 39

Therefore, the Administrative Procedure Act has not changed the *Pottsville* decision one whit.

State contends that any action remaining to the Board would be ministerial and not discretionary. Hence, State argues, the court should issue an order in the nature of mandamus directing the Board to issue a certificate to

State. This is exactly the same argument which was rejected by this Court in the *Pottsville* case. In that case the Court of Appeals had actually issued an order of mandamus to the Federal Communications Commission, and this Court vacated the order. State overlooks the fact that the Board would have *continuing discretion to select the successful applicant* in the light of the facts as they might appear on remand. The Board has never yet exercised its discretion to select State, and the court can not compel it to.

Section 401(d)(2) of the Act provides that when application is made for a *temporary* certificate (the type involved here), the Board "*may*" issue such a certificate upon finding that the public convenience and necessity require the service and that the applicant is fit, willing and able. In contrast, section 401(d)(1) provides that in the case of an application for a *permanent* certificate, the Board "*shall*" issue the certificate when it makes the prescribed findings. The use of the word "may" in section 401(d)(2) emphasizes the fact that on any remand of this case the Board would have discretionary power to hold further proceedings as the public interest might require. Contrary to State's argument, State would not be entitled to a certificate as a matter of law.

CONCLUSION.

The Board found as a fact that Piedmont was an applicant for the routes awarded. This finding was based on substantial grounds, and should be sustained by this Court. Furthermore, assuming that Piedmont was not an applicant for some of the points awarded, the Board had full power to include in Piedmont's certificate authorization to serve these points.

The Board also found as a fact that Piedmont was fit, willing and able to provide the service. This finding is fully substantiated by the evidence, and it too should be sustained by this Court.

The Board's award to Piedmont should therefore be affirmed.

Respectfully submitted,

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